ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Ronald Brasher	)	
Licensee of Private Land Mobile Stations WPLQ202, KCG967, WPLD495, WPKH771, WPKI739, WPKI733, WPKI707, WIL990, WPLQ745, WPLY658, WPKY903, WPKY901, WPLZ533, WPKI762, and WPDU262	)	EB Docket No. 00-156

To: Administrative Law Judge, Arthur I. Steinberg

OPPOSITION TO MOTION TO REOPEN THE RECORD AND REQUEST FOR SANCTIONS

Pursuant to 47 C.F.R. §1.45(b), Ronald Brasher, Patricia Brasher, and DLB Enterprises, Inc. dba Metroplex Two-Way, by and through counsel, hereby files the following Opposition to the Enforcement Bureau's Motion To Reopen The Record To Accept Additional Exhibit Into Evidence in this matter.

Respectfully Submitted,

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Summary

By its Opposition, Defendants hereby show that the Bureau's proffered evidence and associated request to reopen the record is untimely, will result in violations of fundamental fairness and due process, is without factual or legal support, must be deemed to be extraordinary as it is unsupported by Commission rule, and is intended solely to prejudice unfairly the Court. Accordingly, Defendants request that the Court summarily reject and deny the Bureau's Motion as fatally defective and inappropriate for all purposes and to provide those sanctions requested herein.

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To: Administrative Law Judge, Arthur I. Steinberg

OPPOSITION TO MOTION TO REOPEN THE RECORD AND REQUEST FOR SANCTIONS

1. Pursuant to 47 C.F.R. §1.45(b), Ronald Brasher, Patricia Brasher, and DLB Enterprises, Inc. dba Metroplex Two-Way, (collectively "Defendants"), by and through counsel, hereby oppose the Motion To Reopen The Record To Accept Additional Exhibit Into Evidence ("Motion") filed by the Enforcement Bureau in this matter, stating the following:

2. The Bureau's proffered evidence and associated request to reopen the record is untimely, will result in violations of fundamental fairness and due process, is without factual or legal support, must be deemed to be extraordinary as it is unsupported by Commission rule, and is intended solely to prejudice unfairly the Court. Accordingly, Defendants request that the Court summarily reject and deny the Bureau's Motion as fatally defective and inappropriate for all purposes and to provide those sanctions requested herein.

3. The Record Is Closed. Defendants respectfully draw the Court's attention to the record in this matter which clearly shows that the record is closed and that an order formally closing the record was issued without objection or exception having been filed by the Bureau within the time

period for same.[1] Accordingly, the Bureau's characterization of the status of this matter is wholly in error, *i.e.*, that the matter remains open for any purpose suggested by the Bureau.

4. That the Bureau has not provided within its Motion an actual representation of the true facts is shown by the Bureau's statement at Paragraph 7 of its Motion, which states, "Bureau counsel promptly relayed those suspicions to the Presiding Judge with Ms. Bolsolver's [sic] request to do an additional examination of the documents. TR 2410. The record does not reflect any ruling on that request by the Presiding Judge." Ignoring the syntax in the second sentence which might suggest that the Presiding Judge made a request, the fact is that no such request was made.

5. Had Bureau counsel quoted from the record in its Motion, rather than mischaracterizing the record, the Bureau would have reported that the record states as follows: [Ms. Lancaster speaking] "I would like to add, Your Honor, that since looking at what their exhibits were going to be, Ms. Bolsover would like to do an additional examination because it appears to her that .." TR2410 at Lines 10-12. There is no request made. There is no ruling suggested. There does not even exist a question on the record regarding this matter. Nothing. Accordingly, Bureau's suggestion that a ruling was required then or now is belied by the fact that Bureau counsel never requested a ruling. Rather, Bureau counsel made a declaratory statement. Accordingly, Bureau counsel's claim to the contrary, the record clearly shows that this alleged basis for reopening the record is without merit.

5. The Bureau's other alleged justification for its extraordinary Motion is similarly without basis on the record. "[The Presiding Judge] invited the witnesses to come forward, at

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[1] Order, FCC 01-M-06 (released March 15, 2001) ("Order").

any time prior to issuance of a decision in this case, with any new information they might remember that would aid the Commission in properly resolving the issues before it. TR2246-47" Motion at p. 5. (emphasis added). Again opposing counsel has mischaracterized the record. But even had opposing counsel not misstated the record, the Bureau cannot even meet that test included in its mischaracterization. Ms. Bolsover has not "remembered" anything. The witness did not have a revelation or a recollection of facts which she previously possessed and, thus, felt compelled to bring forth for the purpose of assuring accurate testimony. The alleged evidence offered is not borne of remembering. It is borne of further gathering of assumptions and presumptions in an effort to bolster improperly the Bureau's case. Accordingly, Bureau counsel has admitted that its Motion is improperly brought.

6. Had Bureau counsel, instead, quoted directly from the record, its Motion might have included the following:

> Judge Steinberg [speaking to Norma Sumpter]: And I would like to say - - and this goes for, to any of the witnesses that are prepared, and counsel can advise their witnesses of this fact - - if any witness wakes up in the morning and discovers that something major that they told us here during the hearing is no longer accurate, I would like to know. And we can possibly reopen the record and take additional testimony.
>
> I told this to your daughter, Jennifer, and I will tell this to you. And you can tell this to Melissa and Jim. And Mr. Brasher, the two Mr. Brashers can tell it to the two Mrs. Brashers. That what we are trying to do here is to determine what in the world happened.

TR2246 at Lines 6-16. The open quote of the record demonstrates the clear parameters of the Court's suggestion that the record might be reopened, as to the type of testimony and the persons from whom such testimony might be given. The type of testimony is specifically, "something major...told us here during the hearing [that] is no longer accurate." *Id.* Ms. Bolsover's newly

cobbled evidence does not fall within the description provided by the Presiding Judge. She is not seeking to correct a claimed earlier misstatement at trial. Instead, the Bureau's use of this alleged evidence is an attempt to shore up previously unsupported testimony. That is not the type of evidence which the Presiding Judge suggested might be acceptable. Therefore, the evidence proffered by the Bureau does not meet either the Court's stated test or the Bureau's test contained within its Motion.

7. Further, the Presiding Judge's statement was regarding witnesses who had then previously testified. The Presiding Judge's statement does not suggest or invite future witnesses to recollect or recant. Since, pursuant to the Bureau's sole discretion and obvious trial strategy, Ms. Bolsover testified after the above statement was made by the Presiding Judge, the statement does not include any testimony offered by Ms. Bolsover. Nor, it may be noted, did the Presiding Judge list any of the opinion witnesses which had testified prior to the relevant statement. It is clear, therefore, that the Presiding Judge's invitation was solely to persons with personal knowledge of the relevant events and was not extended to persons offering only an opinion, such as Ms. Bolsover. Any other interpretation would render meaningless the Court's order closing the record.

8. Further, the Court specifically set forth those witnesses for which its invitation was to apply. The Presiding Judge mentioned each affected witness by name, leaving nothing to Bureau counsel's creative imagination. Had the Bureau quoted directly from the record in its Motion, the conspicuous absence of Ms. Bolsover's name would have been made obvious. Instead, the Bureau decided that its need to prejudice the trier of fact outweighed its obligation to act within the confines of the Court's orders and relevant law.

9. Finally, if the Bureau wished for the record to remain open, it could have timely requested such relief from the Court, setting forth its justification for same. Yet, the record is silent as to any objection from the Bureau when the record was closed at the end of the hearing, and no objection was posed to the Court's Order closing the record. However, by the Bureau's own admission it had specific knowledge of the alleged evidence which it intended to prepare and submit for acceptance in this matter. In essence, therefore, the Bureau sat upon whatever rights it had to make such a request in a timely, procedurally proper manner; and instead, seeks extraordinary assistance from the Court in an attempt to bolster its case. Defendants aver that whatever right the Bureau had to object to the closing of the record was waived by the Bureau's failure to request timely a tolling of the record closure, and has been lost by the passage of time and the greater need to assure fairness in the acceptance of evidence.

10. The Bureau Does Not Meet the Requisite Evidentiary Standard. It is notable that the alleged evidence attached to Bureau's Motion was either known or could have been known by the Bureau prior to the issuance of the Court's Order closing the record. Nothing put forth in the Bureau's Motion suggests that either the expert or the Bureau were not fully aware of the Bureau's duty and opportunity to offer timely into evidence the proffered evidence. Nor has the Bureau shown that due diligence or reasonable inquiry would not have made the evidence available in a timely manner. In fact, the record clearly shows that Ms. Bolsover was given ample time prior to her testimony to glean any and all presumptions or opinions she chose to offer regarding the relevant documents; and for opposing counsel to have interviewed Ms. Bolsover to identify the entire breadth and contents of any testimony which Ms. Bolsover might offer while on the stand. Nothing in the record or in the Bureau's Motion suggests, much less

proves, that the Bureau did not have full opportunity to discover and offer this alleged evidence. In fact, the contrary is true.

11. By opposing counsel's own admissions, the Bureau simply did not gather that alleged evidence for the purpose of presentation at trial. As to the examination of copies by Ms. Bolsover, which examination appears to form the basis of the newly proffered evidence, Ms. Lancaster stated, "My impression prior to that time had been that the postal forensic lab really didn't want copies, they only wanted originals because copies are too unreliable. Consequently, I didn't send them copies. Ends up I accidentally sent her one that we thought was an original and she informed me it was not an original, but aside from that, I tried to send originals." TR2409, Lines 15-21. By that admission, it is obvious that Ms. Bolsover's failure to review the copies was not based on any inability on the Bureau's part, but rather it was based on the Bureau counsel's misimpression as to what the expert witness would be willing to examine. This is clearly an error arising out of a lack of diligence in the Bureau's determination of what it might have examined and for what purposes.

12. At paragraph 6 of its Motion, the Bureau states the test for reopening of the record to be that "a petitioner must show that it relies on newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier..' ." citing Evergreen Broadcasting Co., 7 FCC Rcd 6601, 6602 (1992) (Evergreen). The Bureau commanded the services of its expert witness for over a month prior to trial and during that entire time it possessed all documents upon which the newly proffered evidence was based. How then can the Bureau credibly claim that it could not have, through the exercise of due diligence, offered this

alleged evidence prior to the closure of the record? Simply, the Bureau's claim that it meets the Evergreen test stretches credulity.

13. In further testing the extreme limits of credulity's elasticity, the Bureau puts forth Evergreen and William L. Carroll, 8 FCC Rcd 6279 (1993) (Carroll) as legal support for its request. With just a jot of scrutiny of those decisions, the Court would quickly discover that the cited decisions not only fail to support the Bureau's request, but, in fact weigh entirely against it. The relevant contents of those decisions are noted as follows:

14. In Evergreen, the Court identified the first prong to the test for reopening a hearing to be, "[t]hus, a request for further hearings 'must be filed promptly after the facts are known or could reasonably have been known to the moving party." *citing* Great Lakes Broadcasting, 6 FCC Rcd 4331, 4332 p.8 (1991). It is notable that no such motion was made by the Bureau and that its Motion is long following when the Bureau knew or should have known of the existence of the proffered evidence. What is unfortunately of even greater note, however, is the fact that the Bureau failed to reveal this prong of the test for acceptance of its Motion. It appears, therefore, that the Bureau's penchant for misstating the record is not contained to the record in the instant matter, but further extends to allegedly supportive case law.

15. But even if the Court focuses solely on the lonely prong the Bureau did apply, the Bureau failed to provide the Evergreen court's interpretation of the quality of the new evidence that might justify reopening the record. That court said, "[i]n order to satisfy the second prong [regarding the allegedly new evidence], the petitioner must (a) allege a substantial and material question of fact that potentially disqualifying misconduct has occurred; and (b) demonstrate a substantial likelihood of proving its potentially disqualifying allegations if the case is remanded

for further hearings." *Id.* This Court may note that the Bureau's Motion speaks to none of these points. The Court may further note that this test appears to speak to a different procedural position. The reason is because Evergreen pertains to a request to reopen the record to expand issues.[2] Therefore, to the extent that Evergreen is relevant, the Bureau has engaged in an inexcusably liberal use of that decision in its omission of relevant portions which, upon examination, fully undercut its Motion. Indeed, had the Bureau been fully candid in its use of Evergreen, it would have quoted the following, "It is therefore appropriate for the Commission to 'apply a more exacting standard in weighing the substantive sufficiency of belated motions [for further hearings] than in ruling on timely ones,' Omaha TV 15, Inc., 4 FCC Rcd 730, p.5 (1988), and to require strict adherence to these standards. Hearing Reform Order, 6 FCC Rcd 157, 161 p. 30 (1990). " *Id.* Defendants aver that the Bureau has not met the standards contained in Evergreen which it strangely cited in support.

16. The Bureau's further use of Evergreen appears in its citation to Carroll, which relies nearly entirely on Evergreen in reaching its decision as to whether the record should be reopened to include a written declaration. In Carroll the court found that "[t]he Petition To Reopen is procedurally deficient." Carrol at para. 4, noting that "Carroll has not shown, or even tried to explain, why it could not have presented Johnson's declaration earlier in this proceeding." *Id.* Again, the court looked to the ability of the moving party to have earlier presented the evidence. In Carroll, as in the instant matter, the moving party could have obtained the declaration via simple diligence, *i.e.* asking the declaring party to provide same. When the moving party fails to

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[2] In fact, the Bureau has cited no supportive case law and the moving party in Evergreen lost in its bid to have the record reopened due, in part, to its failure to present evidence that could have been presented via exercise of due diligence.

do so, that failure is not deemed evidence of the moving party's *inability* to act. Rather, it is evidence of the moving party's *failure* to act, which failure does not form a basis for relief.

17. The truth of the matter is that the Bureau's request might be best characterized as novel, if not extraordinary. The Bureau has brought forth no case law which demonstrates that any moving party has ever successfully reopened the record for the purpose requested and, as the moving party, the Bureau has the obligation to demonstrate that such action is lawful, appropriate and proper in this instance. The Bureau has failed in this effort. However, more disturbing is the Bureau's suggestion that its Motion is other than novel. Necessary candor to the Court would require the Bureau to reveal the unusual nature of its request or, in the alternative, its duty would include a proper reflection of the case law employed to allegedly support its request. The Bureau chose neither course and, instead, chose to reflect improperly both the record of this matter and the case law cited. Under the circumstances, Defendants have no option other than to assert that the Bureau's Motion is an extension of the Bureau's bad faith use of this expert witness' testimony, both at hearing and now.

18. The foregoing, more thorough, examination of the case law presented by the Bureau in support of its Motion shows that the case law is exactly inopposite to the propositions put forth by the Bureau. Despite its claim to the contrary, the case law not only does not support grant of the Bureau's Motion, but supports denial of the Motion. Standing alone, the case law should direct this Court to deny the Motion. However, Defendants respectfully request that the Court look even further and explore the motivations of the Bureau in even attempting to bring this extraordinary Motion before the Court.

19. The Bureau's Motion Is Brought In Bad Faith. Defendants aver that the Bureau's use of this witness, for all purposes, has been solely to unfairly prejudice Defendants' case, and that this most recent use of Ms. Bosolver's efforts is an obvious example of prosecutorial excess from which Defendants seek the Court's protection. The Motion represents a premature attempt to place conclusions of fact and law based on highly questionable evidence, for which no cross examination has been performed or opportunity provided. Although the Bureau's description of the alleged Background of this matter is rife with conclusions of fact which are insufficiently supported and often contradicted by the entirety of the record and represent little more than the Bureau's attempt to string together allegations for the purpose of supporting its ultimate improper conclusion, *see*, paragraphs 2-5 of the Motion, the most egregious and inflammatory statement is contained in the final lines at paragraph 5, wherein the Bureau baldly states, "[m]ore significantly, it would indicate that the Brashers have lied repeatedly..." It is impossible that the Bureau might believe or credibly contend that this conclusion can be accepted via its Motion without the benefit of rebuttal, cross examination or further testimony. Yet, this is exactly what the Bureau contends in its conclusion at paragraph 11 of the Motion.

20. Defendants strenuously reject the Bureau's conclusions at paragraph 11 of its Motion which state that neither the Defendants nor the efficiency of the adjudicatory process will be undermined by grant of the Motion. To the contrary, acceptance of the evidence via reopening of the record would allow untested, unexamined, unsupported evidence to be placed before the Court and interpreted only by the Bureau. Indeed, the Bureau has not even suggested that its witness might be available for cross examination regarding this belated statement. Due process rights, at their most fundamental, were created for the specific purpose of denying efforts to turn

an adversarial proceeding into an *ex parte* recitation of unrebutted, unanswered accusations and conclusions. Yet, this is what grant of the Bureau's Motion would allow and the Bureau's cavalier dismissal of Defendants' rights is both disturbing and distasteful.

21. Defendants will, as directed by the Court, reserve their proposed conclusions of law and fact to present same to the Court in accord with the processes and procedures created within the Presiding Judge's order. Although the temptation exists to respond directly to the outrageous claims lofted by the Bureau as fact, being drawn into such a discussion would place Defendants as far outside the procedural dictates of the Court and the law as the Bureau has chosen to wander. Additionally, Defendants have no intention of dealing with the alleged substance of the Bureau's claims unless those claims might be met by cross examination, and the introduction of additional testimony by each of the following: Ron Brasher, Patricia Brasher, Diane Brasher, David Brasher, Norma Sumpter, Melissa Sumpter, Jim Sumpter, Jennifer Hill, Carolyn Lutz and any other witness which Defendants deem necessary for the purpose of rebutting this witness' opinion, including an additional expert witness for the purpose of determining whether Ms. Bosolver's belated, untested opinion might be confirmed by any other source or person.[3]

22. Indeed, the Bureau's use of this witness has been fraught with evidence that the Bureau has consistently intended to deny Defendants the ability to examine thoroughly each witness in this trial. Holding back the second report prepared by this witness in an effort to surprise the Defendants at the conclusion of the trial, thus depriving Defendants' counsel of its

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[3] In an abundance of caution, Defendants hereby respectfully request that if this extraordinary Motion is granted, that the hearing be reopened for the purpose of cross examination of Ms. Bosolver regarding this evidence and for the taking of such rebuttal testimony from other witnesses as Defendants may deem prudent and necessary.

ability to properly question prior witnesses regarding the opinions offered by this witness, was fully noted at trial.[4] That damage having been done to Defendants' rights, the Presiding Judge and counsel sought to resolve the matter of surprise to ameliorate any assault on fairness to the parties. Having managed to have the second report placed before the Court, despite the questionable nature of its contents, Defendants' counsels were, at the least, provided an opportunity to cross examine on the manner in which the second report was prepared and the manner by which the opinions expressed therein were arrived. In its Motion, the Bureau does not even offer that.

23. Based on the foregoing, Defendants aver that the Bureau's Motion arises out of a bad faith attempt to prejudice unfairly the trier of fact by asserting inflammatory evidence and unsupported conclusions, which assertions the Bureau knew were outside the boundaries of law and due process.[5] The Bureau's Motion cites no rule section under which it is brought, because it

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[4] Bureau's counsel's employment of this tactic was contrary to the promises made by the Bureau in pre-trial conference before the Presiding Judge, wherein Bureau counsel agreed to provide those written conclusions of its handwriting expert. What was, in fact, received was half a loaf. Regardless of whether, absent that promise, the Bureau was under an obligation to provide all or any written report, its tactic of withholding the second report in a manner contrary to its stated promise resulted in a misstatement to both Defendants' counsel and the Presiding Judge.

[5] Whether evidence is deemed to be prejudicial in nature such that its acceptance, despite claimed relevancy, would result in greater harm to the efficient operation of justice than the value of its acceptance, is weighed via a determination of whether "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the [trier of fact], or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, Federal Rules of Evidence. The Bureau's gratuitous conclusions regarding what the evidence allegedly demonstrates creates the danger of unfair prejudice and an environment that is intended to mislead the trier of fact. Acceptance of this evidence via a reopening of the record would necessitate the taking of additional testimony from several rebuttal witnesses, thus leading to undue delay, cost, and a needless presentation of cumulative evidence. Therefore, the risks associated with the acceptance of this belated evidence all point toward

knew that none existed. The Bureau's Motion points to no supporting case law because it knew that none existed. The Bureau's reflection of the record is false and it knew it to be false, thus it specifically chose to not quote directly from the record. The case law cited by the Bureau undermines totally its position, however, this fact is concealed by the Bureau in its Motion. The Bureau's argument suggests a single prong test for grant of its Motion, however, as shown above, the test includes, at least, two prongs, the second of which the Bureau fails entirely to meet or even discuss. In sum, the Motion is wholly devoid of merit for any purpose. But, most disturbingly, the Motion demonstrates fully that the Bureau knew the Motion was wholly frivolous when conceived and filed.[6]

24. The Commission discourages the filing of frivolous motions and other pleadings and admonishes practitioners to only file documents for which "there is good ground to support it.." 47 C.F.R. §1.52. The Bureau's Motion does not meet even the most liberal threshold for "good ground." It is, at its core, an attempt to abuse the Court's processes by misstating the record and the law. Nothing contained in the Commission's rules creates an exception for attorneys who are in the employ of the agency. The Bureau counsel is held to the same standard as all other

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unfair prejudice which may result in the appearance of an undue tendency to suggest decision on the merits of the entire matter, coupled with the attendant delay which would arise from the necessity to provide Defendants an ability to cross examine this witness and to provide its own rebuttal witnesses to offset this surprise evidence. Accordingly, Defendants aver that the proffered evidence is unduly prejudicial and should be excluded.

[6] The Bureau's motivation for filing its Motion is revealed in the fact that it has placed the inflammatory, prejudicial material before the Court prior to any ruling that such evidence will be accepted. Although the Presiding Judge's ability, to resist being affected by the unfairly incendiary nature of the Bureau's unsupported conclusions, is noted, Defendant's object most strenuously to the Bureau's attempt to sway the Court's view of the testimony and evidence properly entered at trial, through the Bureau's belated and intentional tainting of this proceeding.

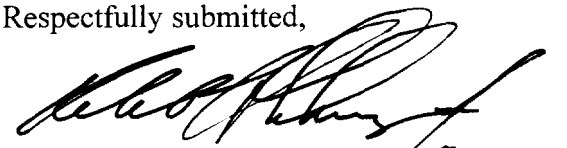
attorneys practicing before the agency, indeed, Part 19 of the Commission's rules suggests that the standards may even be higher. But whatever the appropriate standards for attorney conduct may be, Defendants suggest that Bureau counsel be reminded of those standards and that sanctions in addition to denial of the Bureau's Motion be exercised.

25. Sanctions Are Appropriate. Given the consistent nature of abuse, surprise, and convolution of the record engaged in by the Bureau in its use of this witness, Defendants respectfully request that all testimony and evidence given by this witness which goes beyond the contents of the first report provided to Defendants' counsel, be stricken from the record and given no decisional weight. It is obvious that the Bureau's further use of this witness, beyond the creation of the first report, has been and continues to be a scheme to deprive Defendants of their respective due process rights and to place on the record inflammatory, scandalous opinions of questionable use in a decidedly inappropriate manner. Only by removing, root and branch, the tree which has borne the Bureau's poisonous fruit can the Court hope to preserve the rights of the Defendants which have been under assault by the Bureau from the moment this witness expanded on her testimony beyond the scope of the first report. Additionally, the Court's grant of Defendants' request would demonstrate that there does not exist two standards of conduct and candor for counsel appearing before the Court, one for employees of the agency and one for outside counsel.

26. As children, many of us played a game called "got you last." This variation on the game of tag was played by undersigned counsel and recollection of those games suggest a greater violence than tag. We excuse or supervise the games of children which can result in both intended and unintended harm to the weaker participants. But still, some children persist beyond

scolding and require a "time out." Defendants respectfully request that the Court recognize the Motion for what it is, a form of "got you last" intended to wreak violence upon the rights of the Defendants. Accordingly, Defendants respectfully request that the Motion be denied and that the Bureau receive a "time out" in the form of those sanctions requested herein.

Respectfully submitted,



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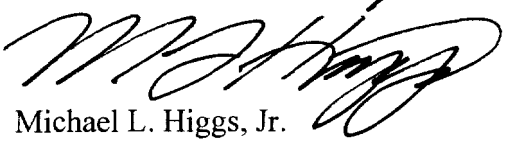

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Dated: April 24, 2001

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CERTIFICATE OF SERVICE

I, Ava Leland, hereby certify that the original and copies of the foregoing Opposition in EB Docket No. 00-156 was served by hand delivery and/or facsimile upon the below listed parties on this 24th day of April, 2001.

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